NOTES

The author of *The Obligation of the United States to Return Enemy Alien Property* (1921) 21 COLUMBIA LAW REV. 666, in view of the unusual circumstances and to correct possible serious misapprehension, wishes to state that the suits against the Forstmann & Huffman Co. referred to in footnote 1, were dismissed because it was found that the suits were without foundation.

ACTION FOR THE PURCHASE PRICE OF GOODS THAT CANNOT READILY BE RESOLD.—When may the seller recover the contract price of goods in which title has not passed by reason of the buyer's wrongful refusal to accept the goods? The Uniform Sales Act, § 63 (3), provides: "Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of § 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may keep the goods as the buyer's and may maintain an action for the price." Like many codifications, this section has produced considerable difficulty. Are "goods that cannot readily be resold" goods of a peculiar nature not generally dealt in by merchants in the course of business, *e. g.*, a portrait painting, a machine of an unusual pattern or size; or do they include all goods in which there is no actual buying at the time? And what is a "reasonable price"? In the recent case of *Wimpheimer & Bro. Inc.* v. *Schwartz* (1921) 116 Misc. 480, 190 N. Y. Supp. 164, the defendant buyer refused to accept velvet manufactured for him by the plaintiff under contract, the title to the goods thus remaining in the plaintiff. In an action for the contract price under § 63 (3), the defendant demurred on the ground that the plaintiff failed to allege that there was no available market. *Held,* demurrer overruled. The chief contention arose over the construction of the New York Personal Property Law[1] but the case, in unequivocal language,[2] lays down the broad rule that the existence of an available market does not defeat a suit for the price on the theory that the goods cannot readily be resold at a reasonable price. The court interprets § 63 (3) as requiring only that it be impossible to sell the goods to another vendee at a price which is reasonable as compared with the contract price.

Before the Uniform Sales Act it was probably the weight of authority in this country that the seller could recover the price whenever title did not pass because the buyer wrongfully refused to accept the goods.[3] Many states restricted this doc-

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[1] § 144 (3), corresponding to § 63 (3) of the Uniform Sales Act omits subsection (4) in stating "and if the provisions of 145 [*i. e.*, 64 (4)] are not applicable," thus reading on its face that the action lies if the provisions of § 145 [§ 64] do not apply. The court properly ruled that this omission was inadvertent, as the logic and arrangement require this construction, aside from the fact that the original Uniform Sales Act contains the (4). The two sections deal with different remedies, § 63 treating of the action for the price, and § 64 the action for breach of contract by non-acceptance. § 64 (3) in speaking of an available market merely explains what the natural loss usually is under § 64 (2) and is not meant to refer over to § 63 (3). Of course, this merely proves that the statute does not expressly require proof of an available market, but does not mean that available market has therefore no bearing on whether goods cannot readily be resold.

[2] The language prevents interpreting the decision as merely deciding that an available market might be an affirmative defense and need not be alleged by the plaintiff.

[3] *Bement* v. *Smith* (N. Y. 1836) 15 Wend. 493, an early leading case, was on a

trine to goods of a peculiar kind not readily salable and as to which a market price could not readily be fixed;[4] and this was the view adopted by the Act. The courts generally stated in these cases that in specially manufactured articles made after a particular fashion or for a particular use, there could not be any market value, and hence the plaintiff ought to recover the price. However, goods can be of a marketable value even though specially made for the defendant, and in such case an action for the price would not lie.[5] It would seem then, that § 63 (3) in attempting to codify these cases, intended to cover only goods of a special nature, not customarily dealt in and for which a new purchaser could not readily be found. This would probably be clearer if the words "at a reasonable price" were omitted; but they can be explained away as meaning a price which estimates the purpose for which the goods were made, since all goods have some exchange value, if it be only as junk. On the other hand, conditions might be such that goods of any type could not readily be resold, and the statute might well apply to them. Goods can be non-marketable for reasons other than their unusual nature. The question resolves itself into a definition of marketable.[6] To have a true market there must be merchants ready and willing to buy that kind of goods, in that locality, at that time. It frequently happens in the depression period of the business cycle that goods heavily traded in approach a standstill in buying and manufacturing, and literally cannot be given away. Cases speak of an available market as a locality for such goods[7] and the market price as the current price fixed by sales of similar property in the ordinary course of business; but if there are no buyers making offers in regular course, there is no available market and the goods cannot readily be resold, regardless of their nature.

The term "reasonable price" is capable of various interpretations and might mean reasonable with regard to the cost price, the market price, or the contract price. It is submitted that either of the first two is within the intention of the section, but that there is no logical basis for the decision in the instant case that a price to be reasonable must be justly near the agreed price.[8] Though proceeding

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contract for a special sulky to be built, but later cases extended the rule to apply to all kinds of goods. *Osgood* v. *Skinner* (1904) 211 Ill. 229, 71 N. E. 869; *Rastetter* v. *Reynolds* (1903) 160 Ind. 133, 66 N. E. 612; see *Van Brocklen* v. *Smeallie* (1893) 140 N. Y. 70, 75, 35 N. E. 415; *Dustan* v. *McAndrew* (1870) 44 N. Y. 72, 78; *Habeler* v. *Rogers* (C. C. A. 1904) 131 Fed. 43, 45. This rule originally sprang from some early cases which in order to evade the Statute of Frauds, construed the contract as one for work and labor at an agreed price. Thus courts have said in cases where specific articles were manufactured by the vendor, that the price was recoverable because the value consisted of work and skill. *Gordon* v. *Norris* (1870) 49 N. H. 376, 383; *Black River Lumber Co.* v. *Warner* (1887) 93 Mo. 374, 6 S. W. 210; see Williston, *Sales* (1909) § 560.

[4] *River Spinning Co.* v. *Atlantic Mills* (C. C. 1907) 155 Fed. 466; see *Kinkead* v. *Lynch* (C. C. 1904) 132 Fed. 692, 695; *Smith Bros.* v. *Wheeler* (1879) 7 Ore. 49, 53, 54; *Black River Lumber Co.* v. *Warner, supra,* footnote 3, p. 387.

[5] *River Spinning Co.* v. *Atlantic Mills, supra,* footnote 4.

[6] There are three kinds of buying: (1) normal buying for resale in the usual course of business; (2) buying on speculation when the price is abnormally low with the purpose of withdrawing the goods and holding for later resale; (3) buying at the junk value. There is a bona fide market in the real sense only in the first of these three, since the purpose and expense of manufacture is estimated in that case only.

[7] *Yellow Poplar Lumber Co.* v. *Chapman* (C. C. A. 1896) 74 Fed. 444, 456.

[8] (1) Reasonable compared with the cost. This view was very likely intended by the Act, as one taking into consideration the expense and the value of the skill and labor involved. It accords with the historical origin of the notion of special goods. (2) From the position that the Act means at a market price, it follows that the market price is always reasonable, *i. e.,* at the time of resale, and hence that whenever there is an available market, § 63 (3) cannot apply. This likewise accords with the idea of special goods. If the selling price is far below the cost and reproduction cost prices, there is not a true market and so the

on the basis that there is an available market, the court has in mind the case where there is no market at all in the true sense, and so reaches its conclusion. Its argument would doubtless be: "Either there is an available market, or there is not. If there is not, the goods cannot readily be resold. If there is, they can be resold for a reasonable price or they cannot. If they cannot, § 63 (3) applies." This argument stands or falls with its unwarranted definition of "reasonable." If it is defined in accordance with the purpose of the Act as here contended, a true available market produces a reasonable price and so defeats the action. At any rate, recent cases under the Act seem to recognize that the goods need not be of a special nature[9] and yet suggest that an available market prevents a suit under § 63 (3).[10]

The situation of the seller under the section is extremely unsatisfactory. He must decide at his peril the jury question "whether or not the goods can readily be resold at a reasonable price" in order to determine whether to sue for the price or for damages for non-acceptance. If there is no available market he would find it difficult to prove his damages in an action for non-acceptance, and even if there is a market, the determination of a market value is no easy task. The market price may hold up numerically in slight buying, yet if the plaintiff were to unload all the goods from the repudiated contracts, he would break the market and drive the price down. The theory of damages for non-acceptance presumes a resale, and the seller ought to recover the contract price less what he would have received for the goods on resale. It would be utterly impossible for a jury properly to estimate such an amount. Nevertheless, it seems that the seller, in theory anyway, could recover damages for non-acceptance in any case if he chose to sue for them.[11] But as a practical matter he is between the devil and the deep sea in that he must run the chance of having the jury disagree with him on a difficult question of fact and throw him out of court or else be practically unable in many cases to prove his damages.[12] Pleading both counts would not help because he must elect before the verdict.[13]

This question is of far-reaching importance commercially, and a workable

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price is not reasonable under (1). Thus (2) and (1) are very similar. More precisely, a true market price is akin to reproduction cost. (3) The court in the instant case seems to be unwarranted in assuming that the comparison with the agreed price is intended. Suppose a man makes an unusual bargain and the market remains fixed at a fair sum. There, it could not be said that the resale price is unreasonable because it is considerably below the contract price. The law will permit a man to get the benefit of his bargain even if the price is unreasonable.

[9] *Illustrated Postal Card & Novelty Co.* v. *Holt* (1912) 85 Conn. 140, 81 Atl. 1061 (Christmas cards manufactured for defendant). The goods were not marketable here because no one was buying, the season being over. *Cf. Harbison* v. *Propper* (1920) 112 Misc. 588, 183 N. Y. Supp. 508.

[10] *Prager* v. *Scheff & Co.* (1919) 107 Misc. 500, 177 N. Y. Supp. 28; *United Machine Co.* v. *Etzel & Sons* (1915) 89 Conn. 336, 94 Atl. 356 seems to take this view and to put the proof of the existence of a market on the buyer. This is a just result. *Cf. Baruch* v. *Dery* (1921) 188 N. Y. Supp. 453. This case might have gone on the ground that the price was not reasonably near the contract price.

[11] *I. e.,* the loss naturally resulting under § 64 (2), and a resale helps to fix his damages. § 64 (2) covers the 64 (3) cases, the cases where there is no available market, and the special circumstances cases. Thus some courts before the adoption of the Act in their respective states permitted the recovery of the difference between the contract price and the price the plaintiff had to resell them for, there being no market for the goods. *St. Louis Range Co.* v. *Kline-Drummond Merc. Co.* (1906) 120 Mo. App. 438, 96 S. W. 1040; *Louisville & Nashville Ry* v. *Coyle* (1906) 123 Ky. 854, 97 S. W. 772; *cf. Jarvis* v. *Allen* (1849) 20 Conn. 38.

[12] The plaintiff must make his decision at the time of repudiation, and if he elects to hold as bailee and then the jury decides there was a market, his predicament in proving his damage is apparent.

[13] The solution to this is that ideal system of pleading where the plaintiff would only set out his facts and the court would choose the action.

rule should be had.[14] Regarded as a decision based on the non-existence of a real market, the instant case is correctly decided on its facts,[15] but the broad doctrine it lays down does violence to the original purpose of the section. These sales cases arise chiefly when the market has slumped badly; and if we follow the tendency of the language in the instant case to apply § 63 (3) to marketable goods every time the price falls considerably and so becomes unreasonable as compared with the contract price, we are virtually going back almost in entirety to the law as it existed in New York and elsewhere before the Act[16]—and this despite the meticulous reiterations by the courts that the law has been changed by the Act. This re-transition is effected by interpreting the statute in a way different from its intention, as the cases it codified show. Yet the words on their face easily bear the new meaning placed upon them, which is arrived at by slurring over the word "readily" and accentuating "at a reasonable price."[17] The result reached would not be an undesirable one. It is objected that this amounts to specific performance at law of a contract where the remedy is not mutual. What happens is that the seller is permitted at his election to thrust title on the buyer.[18] But this is done at law in the case of a conditional sale, and a similar thing is done in the case of a defrauded seller.[19] Besides, this argument applies to permitting a recovery of the price even for special goods, and the Act has silenced it as to them. And a denial to the seller of the privilege of suing for the price has detrimental consequences as a practical matter. There is thrown on him the burdens incidental to finding a new purchaser and to risking credit again.[20] In addition, an action for goods sold and delivered, being for a liquidated sum, gets preference on the calendar for trial over a contract action for non-acceptance, which frequently is delayed for a long period because of the overcrowded calendars; and speedy settlement is advantageous to the merchant.[21] In view of these practical considerations and the unsatisfactory status of the law in general under § 63 (3), it is likely that the inroad made by the instant case will be welcomed by succeeding cases as a stepping-stone toward a return to the rule of damages as it stood before the Act.

FEDERAL CONTROL OF SENATORIAL PRIMARY ELECTIONS.—In the recent case of *Newberry* v. *United States* (1921) 41 Sup. Ct. 469, the Supreme Court declared

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[14] The English rule, followed in several American jurisdictions before the Act, is commendably easy to apply. The purchase price is recoverable only when the property has passed (other than in the case of payment on a day certain). Otherwise the plaintiff must sue for damages for non-acceptance. *Atkinson* v. *Bell* (1828) 8 B. & C. 277; *Greenleaf* v. *Gallagher* (1900) 93 Me. 549, 45 Atl. 829; *McCormick Harvesting Machine Co.* v. *Balfany* (1899) 78 Minn. 370, 81 N. W. 10; *cf. Tufts* v. *Bennett* (1895) 163 Mass. 398, 40 N. E. 172. The English Sale of Goods Act has no section corresponding to § 63 (3).

[15] The facts do not appear in the report, but information obtained from counsel seems to indicate that there was no market for resale in the real sense.

[16] See cases, *supra,* footnote 3. Of course title passes to the buyer if the seller recovers the price.

[17] A criticism of this is that it plays havoc with the rule of appropriation in § 19. But § 63 (3) does so no matter how interpreted.

[18] § 63 (3) might be regarded as saying this in other words, and then the rule is the same as the English rule and satisfies § 19.

[19] See Williston, *Sales* (1909) § 563, citing also mistake, duress, and infancy in support of this view.

[20] If the buyer argues that there was a market for resale, it is a fair answer that he should have taken the goods instead of repudiating his contract and should thereby have avoided the lawsuit.

[21] See for example Rules of Supreme Court, First Judicial District in New York County, rule VI. An action under § 63 (3), being for goods bargained and sold, approximates an action for goods sold and delivered. *Cf. Braun* v. *Sorscher* (1919) 176 N. Y. Supp. 472. Delays of fifteen months have occurred in New York to-day in contract actions.